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No. 89-1696

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PEABODY COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,
Petitioners,

v.

HUBERT C. TAYLOR and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITIONERS' REPLY

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PETITIONERS' REPLY

INTRODUCTION

This petition for a writ of certiorari seeks review of a disagreement among the circuits concerning the relevance of medical evidence in a rebuttal inquiry under the black lung interim presumption. 20 C.F.R. § 727.203(b) (1990). The court of appeals invalidated the rule in this regard, feeling compelled to do so by

this Court's interpretation of 30 U.S.C. § 902(f)(2) in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988). The Sixth Circuit previously rejected this conclusion. *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). Three additional petitions for writs of certiorari presenting a closely related disagreement between the Third Circuit and the Fourth Circuit are currently pending. *Pauley v. BethEnergy Mines, Inc.*, 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714); *Clinchfield Coal Co. v. Director, Office of Workers' Compensation Programs*, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-113); *Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs*, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114). A motion to consolidate all four cases recently has been filed by the mine operators involved.

The Department of Labor ("DOL") and Hubert Taylor have responded to Peabody Coal Company's ("Peabody") petition. This Reply is submitted to preserve Peabody's rights with respect to new matter introduced in these responses.

ARGUMENT

I.

Hubert Taylor's opposition to certiorari rests on the premise that he does not need the Social Security Administration's ("SSA") presumption (20 C.F.R. § 410.490 (1990)) in order to obtain an award of black lung benefits, because they must be awarded under the DOL rule. In particular, Taylor theorizes that the administrative law judge ("ALJ") erroneously found rebuttal of the DOL presumption under the second method, 20 C.F.R. § 727.203(b)(2), on the basis of proof that Taylor suffered no pulmonary disability.

Brief of Respondent Hubert C. Taylor in Opposition at 9-13. This argument provides no basis for the denial of an otherwise proper writ of certiorari (1) because it was waived long ago, and (2) because it is incorrect.

When Taylor's claim was decided by an ALJ in 1985, the ALJ held that benefits could not be awarded under the DOL presumption and could only be awarded under the SSA version. App. 38a-39a. Taylor did not cross-appeal from the denial of his claim under the DOL rule after Peabody appealed the award under the SSA rule.[1] The Benefits Review Board then held: "Finally, we affirm the . . . finding of rebuttal under section 727.203(b)(2) [the DOL rule] since this determination was not challenged on appeal." App. 27a. Taylor never presented the issue to the Seventh Circuit, relying instead exclusively on his belief that he was entitled to prevail under the SSA rule. *See* App. 20a. Neither was his current theory suggested in Taylor's 1988 petition for certiorari to this Court. Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 87-1720, at (i), (8).

Taylor long ago waived his right to claim entitlement under the DOL rule by failing to exhaust his administrative or judicial remedies in this regard.[2]

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[1] The regulations of the Benefits Review Board expressly provide for the filing of a cross-appeal within fourteen days after the filing of a direct appeal by an adverse party. 20 C.F.R. § 802.205(b) (1990).

[2] The courts of appeals are in agreement that the failure of a party in a black lung claim to properly raise an issue in the course of administrative proceedings precludes consideration of the matter by the court. *See, e.g., Cox v. Benefits Review Bd.*, 791 F.2d 445, 447 (6th Cir. 1986) (and cases cited therein). This

Taylor's belated assertion that his claim was improperly denied under the DOL rule is also incorrect. The ALJ found rebuttal in Taylor's case under the second method in light of uncontradicted proof that Taylor suffered no pulmonary disability preventing him from working. App. 38a. At the time of the ALJ's decision, the finding would have been affirmed in all circuits. Later, several courts of appeals held that this type of proof most properly supported rebuttal under the third method, 20 C.F.R. § 727.203(b)(3). *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162-63 & n.5 (3d Cir. 1986) (affirming the Benefits Review Board's finding of (b)(2) rebuttal under (b)(3) and noting: "Any dispute over rebuttal labels is of no consequence . . . ."); *Wright v. Island Creek Coal Co.*, 824 F.2d 505, 508 (6th Cir. 1987); *Adkins v. U.S. Dep't of Labor*, 824 F.2d 287, 290-91 (4th Cir. 1987).

The Seventh Circuit has not definitely determined whether the absence of pulmonary disability is properly deemed (b)(2) or (b)(3) rebuttal proof. *Wetherill v. Director, Office of Workers' Compensation Programs*, 812 F.2d 376, 379-80 (7th Cir. 1987). The Tenth Circuit has sustained (b)(2) rebuttal on such

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Court will not consider issues not presented to the court of appeals, absent exceptional circumstances. *See, e.g., E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986). The theory presented by Taylor in response to the petition for certiorari was not presented administratively or in the court of appeals. There are no circumstances present here justifying a departure from the general rules of waiver. Moreover, the consideration of the matter for the first time in this Court is extremely prejudicial to Peabody, which did not present certain theories in its favor because Taylor's concession of ineligibility under the DOL rule made it unnecessary to do so. *See* Brief for the Federal Respondent at 10 n.3.

proof where the claimant failed to challenge the legal standard applied by the ALJ. *Mitchelson v. Director, Office of Workers' Compensation Programs*, 880 F.2d 265, 269 (10th Cir. 1989).

There is, in fact, no circuit in which Taylor's lack of any pulmonary disability would be considered irrelevant proof, and no circuit in which this proof could not, as a matter of law, rebut DOL's presumption. Rebuttal labels are mostly a matter of preference for the courts of appeals and are applied depending upon the facts of the case and its administrative disposition. *See, e.g., Neace v. Director, Office of Workers' Compensation Programs*, 867 F.2d 264, 269 (6th Cir. 1989) (sustaining (b)(2) rebuttal where the claimant alleged that his disability stemmed only from pulmonary disease). Taylor's argument that certiorari must be denied because he is entitled, as a matter of law, to benefits under the DOL presumption is not supported.[3]

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[3] Ancillary to Taylor's mischaracterization of the positions of the courts of appeals is a statutory theory suggesting that benefits must be paid under the DOL or SSA presumption unless the employer actually identifies a job that the miner is able to perform and that is available to him where he lives. Brief of Respondent Hubert Taylor in Opposition at 23-25. The courts of appeals have rejected the proposition that black lung benefits are payable on account of a miner's retirement, unemployment, or non-occupationally related disability. *See, e.g., Mitchelson*, 880 F.2d at 270 ("We are not here concerned with whether claimant is eligible for some form of social security benefits."); *Director, Office of Workers' Compensation Programs v. Beatrice Pocahontas Co.*, 698 F.2d 680, 683 (4th Cir. 1983) ("The Act provides benefits for medical disability and is not a form of unemployment insurance."); *Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 909 (7th Cir. 1990), *petition for cert. pending*, No. 89-7383 (filed Apr. 27, 1990) ("[T]he Act does not compensate disability due to age.").

II.

The Government agrees that the court below erred and that review is warranted, but prefers that this Court grant plenary review in one or two other related cases first, namely *Pauley v. BethEnergy Mines, Inc.*, No. 89-1714, or *Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs*, No. 90-114. The Government's choice is based on the belief that the "(b)(2)" issue presents "unnecessary complications," and in light of the unreported death of Hubert Taylor during the pendency of his 1987 petition for certiorari.[4] Hubert Taylor, in the alternative, agrees that the Court should grant review of the "(b)(2)" question and disputes the Government's contention that a resolution of the (b)(2) question is less pressing or more difficult than a resolution of the (b)(3) and (b)(4) questions presented in the other pending cases. Taylor's estate also asks the Court to grant its motion to substitute.[5]

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[4] *Pauley* presents a similar jurisdictional concern. Taylor's estate has sought to cure the failure to effect timely substitution by filing a motion to substitute which is now pending with this Court. Pauley has sought to avoid abatement by obtaining a *nunc pro tunc* order of substitution from the Benefits Review Board. Supplemental Brief for the Federal Respondent in No. 89-1714. There is some question whether the Benefits Review Board has jurisdiction to act *nunc pro tunc*. *See* 33 U.S.C. § 921(c).

[5] Peabody filed a Memorandum in response to Taylor's Motion to Substitute suggesting that the substitution is either statutory and automatic, or that it is appropriately accomplished *nunc pro tunc*. Peabody waives objections to abatement not only because the issues presented here are in critical need of resolution, but also because, as a practical matter, Taylor's estate may be able to avoid the effect of abatement by seeking a modification and

The petitioners here together with the mine operators involved in Nos. 89-1714, 90-113 and 90-114 have jointly filed a motion to consolidate all of the pending petitions seeking this Court's guidance in the resolution of all perceived tensions between the SSA and DOL rules. The movants for consolidation reject the Government's piecemeal approach for reasons stated in the motion.[6]

The Government is correct in suggesting that a comprehensive solution adds a complication, but the complication is neither unnecessary nor is it particularly complicated. The court below held: "Because the Labor rebuttal rules allow the consideration of medical evidence on rebuttal, while the HEW rebuttal rules do not, the former clearly are [invalid]." App. 9a. While the Government is again correct in suggesting that the holding sweeps more broadly than was necessary, it is, nevertheless, the holding this Court is being asked to review, and not DOL's narrowing of it within the confines of (b)(2). It is simple enough to test the holding and the regulation it invalidates against the mandate of the statute. The Third Circuit and Fourth Circuit cases do not necessarily provoke identical inquiries, and their resolution will not necessarily ascertain the rules that will apply for black lung litigants within the Seventh Circuit. A comprehensive solution is preferable, and it is necessary.

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readjudication by DOL under 33 U.S.C. § 922, *incorporated by reference into* 30 U.S.C. § 932(a). *See also O'Keeffe v. Aerojet Gen. Shipyards, Inc.*, 404 U.S. 254 (1971).

[6] The Government has undertaken to serve its pleadings on all parties in the four cases, and this Reply will also be served on all the parties.

CONCLUSION

The petition for a writ of certiorari and the motion to consolidate this petition with Nos. 89-1714, 90-113, and 90-114 should be granted.

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